Filed 11/8/16 In re E.S. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.S., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. S.G. Defendant and Appellant.	E065786 (Super.Ct.No. SWJ1400072) OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge. Affirmed in part; reversed in part and remanded with directions.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, James E. Brown, Guy B. Pittman and Julie Koons Jarvi, Deputy County Counsel for Plaintiff and Respondent.

S.G. (mother) is the biological mother of E.S. (minor, born September 2009), V.G. (born October 2010), E.F. (born October 2012), and C.F. (born January 2014) (collectively, the children). This appeal only involves minor. Mother appeals the juvenile court's order terminating her parental rights under Welfare and Institutions Code[1] section 366.26. Mother does not challenge the substantive findings made by the juvenile court, but contends that the court's orders must be reversed because the Riverside County Department of Public Social Services (the Department) failed to comply with the notice requirement of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We agree with mother that the Department failed to comply with ICWA, and remand the matter, with directions to the juvenile court to ensure the Department's compliance with ICWA's notice requirement. We affirm the orders of the juvenile court in all other respects.

FACTUAL AND PROCEDURAL HISTORY

In January 2014, the Department received a referral indicating that mother gave birth to C.F., who tested positive for amphetamines. Mother admitted that she had recently used methamphetamine. Mother resided with E.J.F., who is the father of mother's two youngest children. The home had no working utilities and was "filthy."

On January 22, 2014, a section 300 petition was filed as to the children. At this time, minor was four years old; her father was in prison. According to the petition, mother stated that the maternal grandfather was a member of the San Luis Rey Band of

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Luiseno Indians. Mother was not a registered member. Mother received Temporary Assistance for Needy Families (TANF) on behalf of minor. The maternal grandmother (MGM) reported that she had Apache and Shuma ancestry, but was not a registered member. Family members were members of the Torres Martinez Desert Cahuilla Indians (Torres Martinez).

A child welfare services (CWS) history revealed that the maternal grandfather was a registered member of the San Luis Rey Band of Luiseno Indians. Unable to contact the San Luis Rey Band of Luiseno Indians, the social worker contacted the Soboba Band of Luiseno Indians by telephone and spoke with their director of family services. The director informed the social worker that the San Luis Rey Band was not a federally recognized tribe; it was only a state recognized tribe. The CWS history also indicated that minor had family ties to Torres Martinez.

The social worker spoke with mother, who stated that she was not a registered member of any Indian tribe. She stated that minor's father had ancestry with Torres Martinez, but mother did not know if minor was registered. MGM informed the social worker that minor was registered with Torres Martinez. MGM stated MGM was not a registered member of any Indian tribe, but that she was told she had Apache and Suma ancestry through her maternal relative, D.F. According to Emmanuel Olague, the Torres Martinez TANF coordinator, mother received services on behalf of minor. Olague also stated that the tribe was only interested in registered children.

On January 23, 2014, the juvenile court found there was reason to believe that an Indian child was involved, and the Department was to provide notice to all identified

tribes and the Bureau of Indian Affairs (BIA). The children were detained. Olague was present at the hearing. Mother's attorney acknowledged at the hearing that minor was an Indian child and the tribal representative was present. On January 27, 2014, the court again ordered the children detained.

Olague inspected the home of the paternal aunt, T.Z. He informed T.Z., that he would accompany a State of California CWS worker to T.Z.'s home for another inspection. At this time, T.Z. was 19 years old. She had minor in her care. T.Z. stated that she took minor to "Indian Health" for her cough, and had an appointment to enroll her at the Soboba preschool. T.Z. also cared for her two-year-old brother. Minor was placed with T.Z.

On January 30, 2014, the social worker spoke with the Soboba Social Services Director, Nancy Currie, regarding minor's possible Indian ancestry. Currie provided her with the names and dates of birth for mother and the children. The social worker was informed that mother and the children were not enrolled in the tribe and ineligible for membership.

Upon mother's discharge from rehabilitation, Torres Martinez confirmed that mother would receive comprehensive services. Given the intensity of monitoring by Torres Martinez and the Department, the Department requested court authorization for the children to be returned to mother's care upon her successful completion of her inpatient program and obtaining suitable housing. The Department received confirmation from Torres Martinez that the utilities for the house had been paid and were in functioning order. Mother completed her 90-day substance abuse program, and the

Torres Martinez substance abuse counselor confirmed that mother would immediately enroll in the tribal aftercare program. On March 25, 2014, the children were returned to mother's care.

ICWA notice was filed on February 25, 2014. The notice was sent to the BIA and Torres Martinez. The BIA responded indicating that minor's tribal information had been established. Torres Martinez provided a letter stating that minor was a lineal descendant of the tribe and her father was a tribal member. The tribe stated that minor was recognized as a member to the community of Torres Martinez. No notice was sent to the Shuma or Apache tribes. Moreover, the Department never followed up with MGM's claim to Indian ancestry with those tribes.

On April 16, 2016, the juvenile court sustained the petition and found that minor came within section 300, subdivisions (b) and (g). She was adjudged a dependent of the court. The court also found that ICWA may apply. Minor's father was denied services.

The children were detained again after the Hemet Police Gang Task Force responded to parents' home for a probation compliance check regarding E.J.F. on July 16, 2014. Parents were not home; the children were home with the maternal grandparents. The task force found methamphetamine, a revolver, and ammunition; they were all accessible to the children. The home was unsanitary with animal feces on the floors and an infestation of cockroaches. There was an abundance of clutter inside and outside the home.

On July 18, 2014, a section 342 petition was filed to remove minor from mother's care. According to the petition, mother was questioned about Native American ancestry.

Mother reported that minor was a member of Torres Martinez. Mother received TANF. On July 17, 2014, Torres Martinez tribal social services confirmed that minor was a tribal member.

On July 21, 2014, the juvenile court found that ICWA may apply. The children were detained. A jurisdictional hearing was set. Minor was placed with T.Z. According to Olague, minor was being referred to individual therapy and victim's trauma services. Minor's ICWA social worker helped organize visitation.

An Indian Expert Declaration was provided on behalf of minor. The declaration stated that minor was an enrolled member of Torres Martinez. According to the expert, active efforts were provided to prevent or eliminate the need for minor's removal from parents' care, but the efforts were not successful. Case management services would be provided to parents and the Department would be working with the tribe. Moreover, according to the expert, continued custody of the child by parents would likely result in serious emotional and physical harm to minor.

On November 14, 2014, the juvenile court sustained the section 342 petition. Reunification services were provided. On June 19, 2015, the court terminated reunification services and set a section 366.26 hearing.

Torres Martinez elected a tribal customary adoption. T.Z., who was the prospective adoptive mother, was an approved tribal home. Minor had been in the placement since January 2014. During this time, minor returned to mother's care for less than three months under family maintenance status, which was unsuccessful. T.Z. was also a member of Torres Martinez.

Mother was pregnant with her fifth child, J.F. She gave birth to J.F. in October 2014; J.F. was detained by the Department on October 3, 2015. Mother was unemployed and resided in the home of E.J.F's parents. Visitation with minor was arranged by Olague. New allegations of sexual abuse had been made regarding E.J.F.

On November 16, 2015, notice pursuant to ICWA was filed. Notice was mailed on October 28, 2015.

On March 31, 2016, Olague informed the Department that minor did not qualify for Torres Martinez membership. Minor was considered a descendant of a tribal member. She did not qualify for tribal adoption. Minor was not an enrolled member of the tribe and she did not meet the necessary "Indian Blood quorum" for tribal membership. She was recognized by the tribe as member of the community of Torres Martinez. Minor's father was an enrolled member. Minor was not eligible for enrollment. The Department planned to move forward with adoption as minor's permanent plan.

On April 11, 2016, Olague was present at the section 366.26 hearing. The juvenile court terminated parental rights as to minor.

On April 13, 2016, mother filed her notice of appeal.

DISCUSSION

Mother contends that the juvenile court erred in terminating her parental rights because the ICWA notices were insufficient. Specifically, she asserts that the Department failed to provide notice to the Apache tribe. For the reasons set forth below, we agree with mother and conclude that the ICWA notices were inadequate.

"Congress enacted ICWA to further the federal policy '"that, where possible, an Indian child should remain in the Indian community . . . ."'" (*In re W.B.* (2012) 55 Cal.4th 30, 48.) "When applicable, ICWA imposes three types of requirements: notice, procedural rules, and enforcement. [Citation.] First, if the court knows or has reason to know that an '"Indian child"' is involved in a '"child custody proceeding,"' . . . the social services agency must send notice to the child's parent, Indian custodian, and tribe by registered mail, with return receipt requested. [Citation.] . . . [¶] Next, after notice has been given, the child's tribe has 'a right to intervene at any point in the proceeding.' [Citation.] . . . [¶] Finally, an enforcement provision offers recourse if an Indian child has been removed from parental custody in violation of ICWA." (*Id.* at pp. 48-49.) "Thorough compliance with ICWA is required." (*In re J.M.* (2012) 206 Cal.App.4th 375, 381.)

Of concern here is the notice requirement. If an agency "knows or has reason to know that an Indian child is involved" in a dependency proceeding, the agency must send notice of the proceeding to, among others, a representative of all potentially interested Indian tribes. (§ 224.2, subd. (a).) "[F]ederal and state law require that the notice sent to the potentially concerned tribes include 'available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data.' [Citations.] To fulfill its responsibility, the Agency has an affirmative and continuing duty to inquire about, and if possible obtain, this information. [Citations.] Thus, a social worker who knows or has reason to

know the child is Indian 'is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of [Welfare and Institutions Code] Section 224.2 . . . .' [Citation.] That information '*shall* include' '[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.' [Citation.] Because of their critical importance, ICWA's notice requirements are strictly construed." (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396-1397.)

In this case, ICWA notice was provided to Torres Martinez. Torres Martinez provided a letter stating that minor was a lineal descendant of the tribe and that her biological father was a tribal member. The tribe stated that minor was recognized as a member of the community of Torres Martinez.

Mother received services on behalf of minor from Torres Martinez. Olague was involved in the dependency and attended many of the hearings; he inspected T.Z.'s house for placement. The tribe planned to provide mother with comprehensive services. The Department received confirmation from the tribe that the utilities for mother's house had been paid and were in functioning order. Mother was to enroll in a tribal aftercare program. Minor's ICWA social worker helped organize visitation with mother. The BIA indicated that minor's tribal information had been established.

Torres Martinez elected a tribal customary adoption. Minor's placement with the prospective adoptive mother, T.Z., was an approved tribal home. T.Z. was member of Torres Martinez. Minor had been placed with T.Z. since January of 2014. However, two years later, on March 31, 2016, Olague informed the Department that minor did not qualify for tribal membership. She was considered to be a descendant of a tribal member. Minor was not an enrolled member of the tribe and did not meet the necessary Indian blood quorum for membership. Minor was recognized by the tribe as a member of the community of Torres Martinez.

Although the record reveals that minor was considered to be a member of Torres Martinez until the section 366.26 hearing, mother asserts that the matter should be reversed because notice was not provided to the Apache and Shuma tribes. Mother's argument fails as to the Shuma tribes, but we agree with mother that notice should have been sent to the Apache tribes.

First, there is no federally recognized Shuma tribe. Mother acknowledges this. In her opening brief, she stated, "the Federal Register does not list Shuma Tribe as [a] federally recognized tribe." For purposes of ICWA, an Indian tribe "means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians . . . ." (25 U.S.C. § 1903(8).) Therefore, even if minor were of Shuma Indian ancestry, there was no requirement to provide notice to any Shuma tribe.

As to the Apache tribes, no notice was sent. Notice shall be sent "whenever it is known or there is reason to know that an Indian child is involved . . . ." (§ 224.2, subd.

(b).) One circumstance that may provide reason to know that a child is an Indian child is when a person having an interest in the child provides information suggesting that the child is a member of a tribe or eligible for membership in a tribe. Another reason would be if a child's biological parents, grandparents, or great-grandparents are or were a member of a tribe. (§ 224.3, subd. (b).) In this case, MGM stated that she was not a registered member of any tribe, but was told she has "Apache and Shuma" ancestry through her maternal relative, D.F. The Department never followed up with MGM regarding her Apache Indian ancestry and no notice was sent to the Apache tribe.

Therefore, based on the above, the trial court's findings that proper notice was given under the ICWA, and/or whether ICWA applies, are not supported by substantial evidence. A limited reversal and remand to clarify and cure any ICWA noticing defects is warranted,

The Department argues that no notice to the Apache tribe was required because "it was not known, and there was no reason to know, that [minor] was an Indian child through an Apache tribe." "[B]oth the federal regulations and the California Welfare [and] Institutions Code require more than a bare suggestion that a child might be an Indian child." (*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520.) Information that is "too vague, attenuated and speculative" do not give the dependency court any reason to believe that a child might be an Indian child. (*In re Jonah D.* (2010) 189 Cal.App.4th 118, 125.)

In support of its claim, the Department relies on *In re O.K.* (2003) 106 Cal.App.4th 152. In *In re O.K.*, at the section 366.26 hearing, the paternal grandmother

stated that "'the young man may have Indian in him.'" (*In re O.K.*, at p. 155.) The grandmother was not an enrolled member, did not know whether she or the father were eligible for membership, and could not identify a tribe. (*Id.* at pp. 154-155.) The father, who was present at the hearing, made no comment. (*Ibid.*) The court found that there was no reason to believe that the children were Indian children. (*Id.* at p. 155.) Therefore, no notice was sent to the BIA regarding Indian heritage.

The Department also relies on *In re Z.N.* (2009) 181 Cal.App.4th 282. In *In re Z.N.*, the Court of Appeal acknowledged that the social services agency implicitly conceded there was a deficiency given the lack of ICWA noticing and an absence of the court's express finding on the issue. (*Id.* at pp. 297-298.) The social services agency, however, argued the error was harmless and the court agreed because the mother's report of Indian heritage was through the children's *great-grandmothers* and the mother provided no information on her children's Indian heritage. (*Id.* at p. 298.)

This case is distinguishable from both cases. In *In re O.K.*, the grandmother could not identify a tribe. Here, early on in the dependency proceedings, MGM identified two specific tribes—Apache and Shuma—that minor may have Indian heritage through. MGM also gave a name of a relative, D.F., who could have provided information. The Department, however, never followed up with MGM regarding minor's possible Indian heritage with the Apache tribe. Moreover, unlike *In re Z.N.*, *supra*, 181 Cal.App.4th 282, the information about possible Apache heritage did suggest that minor could be a member or eligible for membership as a child of a member of an Apache tribe.

The Department further claims that even if notice should have been provided to the Apache tribes, any error in not providing notice was harmless. "A notice violation under ICWA is subject to the harmless error analysis. [Citation.] 'An appellant seeking reversal for lack of proper ICWA notice must show a reasonable probability that he or she would have obtained a more favorable result in the absence of the error.'" (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 715.)

In this case, without notice to the Apache tribes, it is impossible to determine whether they would have intervened in this case. The Department states that there was no prejudice because "[n]o specific tribe was ever mentioned by [MGM]." This is not true. As discussed above, MGM specifically named two tribes—the Apache and Shuma tribes.

The Department also argues that under section 224.1, any error was harmless. Under section 224.1, "[i]f an Indian child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe under paragraph (2), actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid." (§ 224.1, subd. (e)(3).) The Department claims that, because minor was treated as a member of Torres Martinez, "the broader federal policy behind the ICWA [was] served despite any alleged error in not notifying the Apache tribes."

The Department's argument is without merit. Section 224.1, subdivision (e)(3), does not negate the fact that the Apache tribe should have been notified and has a right to intervene in this case should the tribe determine that intervention is necessary. We cannot deem any error harmless when the Apache tribe has not been given notice or an

opportunity to intervene. Moreover, in this case, section 224.1 is not applicable because minor has not become a member of any Indian tribe. As provided above, Torres Martinez determined that although minor was recognized as a member of the community of the tribe, she was not eligible for enrollment in the tribe. "Congress enacted ICWA to further the federal policy '"that, where possible, an Indian child should remain in the Indian community."'" (*In re W.B., Jr.* (2012) 55 Cal.4th 30, 48.)

DISPOSITION

The case is remanded to the juvenile court with directions to ensure the Department complies with the notice requirements of ICWA. If, after new notices, any of the Apache tribes claim that minor is eligible for membership and seek to intervene, the juvenile court shall proceed in conformity with all provisions of ICWA. If, on the other hand, none of the tribes make such claims following new notices or the court concludes the Department's efforts at compliance were adequate, the order terminating mother's parental rights shall be reinstated.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.